

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioner appeals the city's approval of a conditional use
4 permit for a 26,000 square-foot, two-story office building in a
5 Highway Commercial (C-2) zone.

6 FACTS

7 The office building and 136-space parking lot are proposed on
8 a two-plus acre portion of a 22-acre ownership. The property is
9 designated Highway Commercial in the city's comprehensive plan
10 map. In addition to the C-2 zoning classification, the property
11 is subject to the flood hazard and soil hazard overlay zones.

12 FIRST ASSIGNMENT OF ERROR

13 Petitioner alleges the decision fails to comply with the
14 wetland protection provisions in the zoning ordinance. Section
15 7.060(2) of the ordinance states:

16 "Filling a wetland, other than those in the Coastal
17 Land [sic] and Freshwater Wetlands zone or natural
18 drainage ways, shall be prohibited unless it is
19 adequately demonstrated to the zoning administrator
that it will not adversely affect adjacent property
and that fill is necessary for the desired type of
development."

20 Petitioner says that although the city found filling on the
21 site will be necessary, the city made no findings showing
22 compliance with Section 7.060(2). Petitioner alleges the city
23 misconstrued its planning documents when it concluded the site is
24 not a wetland subject to Section 7.060(2).

25 The city's acknowledged comprehensive plan includes a map and
26 report prepared by Duncan Thomas that identifies significant

1 wetlands. The city noted that the site is not shown as a wetland
2 on the map. The city's planning staff, in its report to the city
3 council, and respondents in their brief, contend that Section
4 7.060(2) is intended to apply only to wetlands shown on the
5 Duncan Thomas maps.

6 Petitioner argues that Section 7.060(2) is not limited to
7 wetlands shown on the plan map. According to petitioner, the
8 ordinance makes no reference to wetlands identified as
9 significant wetlands in the comprehensive plan.

10 If Section 7.060(2) is intended to apply only to significant
11 wetlands on the city's maps, the intention is not apparent in the
12 ordinance. Further, respondents cite no other ordinance or plan
13 provisions limiting the applicability of Section 7.060(2) only to
14 wetlands shown on the Duncan Thomas map. Significantly, the city
15 did not consider the plan map to be conclusive evidence about the
16 location of wetlands subject to 7.060(2).

17 The city found:

18 "The city considers a comprehensive plan's
19 determination, in and of itself, to be substantial and
20 persuasive evidence that the site in question is not a
wetland.

21 "Furthermore, there is additional evidence in the
22 record to substantiate the conclusion that the site of
23 the proposed office building is a wetland. The Duncan
24 Thomas Wetland Map and a wetland inventory map
25 provided by the U.S. Fish and Wildlife Service...both
26 indicate that the office building site is not a
significant wetland area.... The city finds the
Duncan-Thomas map to be particularly persuasive
evidence on the issue of whether or not the
applicant's site is a wetland because the map is
considered to be the city's official guide regarding
wetlands.... Finally, the planning commission

1 chairman, Jerry Black, who is the U.S. Army Corps of
2 Engineers' area representative, reviewed the U.S. Fish
and Wildlife Inventory Map and agreed with the staff
3 that this site is not a designated wetland area.

4 "While there is conflicting evidence and testimony,
the city finds there is more persuasive and
5 substantial evidence to support the conclusion that
the building site is not in a wetland...." (Emphasis
6 supplied) (Record 268-268).

7 These findings illustrate that the city weighed conflicting
8 evidence about the wetland identification and did not consider
9 the plan maps to be an exclusive indicator of wetlands protected
10 by the code. Given the ambiguity in the ordinance about what
11 wetlands are to be protected and the city's consideration of all
12 evidence presented on this question, we do not accept
13 respondent's argument that Section 7.060(2) applies only to
14 wetlands on the Duncan Thomas map.

15 We next turn to petitioner's evidentiary challenge to the
16 city's conclusion that the site is not a wetland. The city based
17 its conclusion on three evidentiary factors:

- 18 1) The Duncan Thomas map does not classify the site
as a wetland.
- 19 2) The wetland map prepared by the U.S. Fish and
20 Wildlife Service does not show the site to be a
wetland.
- 21 3) The statement of Jerry Black, a planning
22 commission member, that the site is not shown on
the U.S. Fish and Wildlife map as a wetland.

23 In addition, respondents point out that the comprehensive
24 plan identifies wetlands in the Skipanon River area where the
25 site is located. The description of the area includes the
26 following:

1 "Wetlands are found along the river including two (2)
2 marsh islands south of Harbor Drive and along the
3 inside of meanders between the 8th Street dam and
4 former Highway 101 bridge."

5 Respondents argue that the omission of the site from this
6 description is evidence that the site is not a wetland.

7 Petitioners point to evidence in the record that conflicts
8 with the city's conclusion. The most explicit evidence is in a
9 biologist's report that identifies and evaluates soil and plant
10 species on the site. However, we are bound by the city's
11 findings of fact that are supported by substantial evidence in
12 the whole record. ORS 197.830(11). A finding is supported by
13 substantial evidence if the evidence could be accepted by a
14 reasonable mind as adequate to support a conclusion. Braidwood
15 v. City of Portland, 24 Or App 477, 546 P2d 777, rev den (1976).

16 The evidence relied on by the city fails to meet this
17 standard. The Duncan Thomas maps of significant wetlands do not
18 purport to identify all wetlands in the city. Although the
19 record does not disclose what criteria dictated preparation of
20 the Duncan Thomas map, a comparison of this map with the U.S.
21 Fish and Wildlife Service wetland map shows many wetland areas
22 were not included on the Duncan Thomas map. Whatever criteria
23 were used, not all wetlands were identified as significant
24 wetlands. Therefore, the Duncan Thomas maps do not support the
25 city's conclusion.

26 Neither does the description of the Skipanon River area in
the comprehensive plan constitute the requisite substantial

1 evidence. The statement that wetlands are found along the river
2 does no more than describe wetlands on two islands and between a
3 dam and a bridge. The statement does not attempt to exclude the
4 existence of other wetlands.

5 The wetland map prepared by the U.S. Fish and Wildlife
6 Service shows more information about the location and
7 characteristics of wetlands. In addition to identifying numerous
8 areas and individual drainage courses as wetlands, the map
9 includes a coded notation of the ecological description of each
10 wetland on the map. The site in question has been marked on the
11 map in an area shown as upland, but located between two drainage
12 courses noted to be wetlands. Because of the large scale of the
13 map, the exact location of the adjacent wetland boundary in
14 relation to the property line of the site cannot be determined
15 from examination of the map. While most of the site is shown as
16 upland, a reasonable mind could not accept the map as evidence
17 that no wetlands are on the building site. See Miles v.
18 Clackamas County, 48 Or App 951, 618 P2d 986 (1980).

19 We therefore concur with petitioner's claim that no
20 substantial evidence supports the city's finding that the site
21 includes no wetlands subject to Section 7.060(2).

22 However, a remand is not necessary for this reason. We must
23 also consider whether the decision meets code requirements for
24 filling wetlands described in Section 7.060(2). As petitioner
25 points out, Section 7.060(2) prohibits filling on wetlands unless
26 the fill 1) will not adversely affect adjacent property, and 2)

1 is necessary for the desired type of development. The county
2 addressed the possible effects of filling on storm water runoff
3 and flooding. Petitioner says these findings do not address all
4 adverse effects filling might have on adjacent properties.

5 This attack is rejected. The city is not required to address
6 all possible adverse effects. Without evidence of particular
7 potential adverse effects, the city need only address facts and
8 circumstances reasonably likely to occur. Dougherty v.
9 Tillamook County, 12 Or LUBA 20 (1984). Petitioner cites to no
10 evidence of adverse effects other than those considered by the
11 city.

12 We also reject petitioner's claim that no substantial
13 evidence supports the city's findings regarding potential damages
14 from flooding and storm water drainage. The city found the
15 quantity and pattern of storm water drainage would not be
16 affected by the development. This finding is supported by the
17 city engineer's statement that the amount of fill required for
18 the project is insignificant considering the size of the drainage
19 shed within the Holbrook Slough adjacent to the site. Record at
20 219. The city engineer's report is substantial evidence
21 supporting the city's finding that storm water runoff after
22 construction would not be detrimental to other property owners or
23 the overall drainage system. See our discussion in the third
24 assignment of error, infra.

25 Last, petitioner alleges the city made no findings that fill
26 on the site is necessary to carry out the proposed type of

1 development.

2 Respondent answers this charge by referring to conditions of
3 the approval that require elevation of the building's lowest
4 level to the base flood elevation. Record 266.¹ Assuming that
5 fill is necessary to support the building as respondent contends,
6 the condition does not demonstrate that fill on wetlands must be
7 necessary to carry out the proposed type of development.²

8 There are two reasons for the deficiency. First, the
9 location of wetlands on the site, if any, is not described. As
10 noted above, the U.S. Fish and Wildlife Service map showed
11 wetlands along one edge of the building site. No findings
12 address whether any part of the site is within the adjacent
13 mapped wetland. Second, the location of proposed fill is not
14 described. Without findings on these two matters, neither the
15 county nor this Board can conclude the proposed fill is necessary
16 for completion of proposed construction.

17 In summary, we find that Section 7.060(2) controls filling on
18 the wetlands, whether or not described on the Duncan Thomas maps;
19 that no substantial evidence supports the finding that the site
20 does not include wetlands; that the findings and supporting
21 evidence are adequate to demonstrate that filling on the property
22 will not adversely affect adjacent properties, and that the
23 findings fail to demonstrate that the proposed fill is necessary
24 to complete construction. Accordingly, this assignment of error
25 is sustained in part.

1 SECOND ASSIGNMENT OF ERROR

2 Petitioner alleges the decision violates the city code
3 parking requirements. The code requires one parking space for
4 each 400 square-foot of gross floor area plus one space for each
5 employee in professional offices with on-site customer services.

6 The city computed 65 spaces are necessary to meet the gross
7 floor area standard based on the size of the entire building. In
8 addition, a proposed tenant for all but 1100 square-feet of the
9 26,128 square-foot building anticipates hiring 71 employees. A
10 condition of the city's approval requires construction of 136 (65
11 plus 71) parking spaces before any part of the building may be
12 occupied. The condition also requires construction of additional
13 spaces equal to the number of employees of future tenants for the
14 1100 square-feet now uncommitted. These additional spaces must
15 be completed before the occupancy of the 1100 square-foot portion
16 of the building. Record at 271.

17 Petitioner says deferring construction of parking spaces to
18 the future violates Section 7.080 of the code. This section
19 states:

20 "In all districts there shall be provided at the time
21 of erecting new structures...minimum off-street
22 parking spaces in accordance with the requirements of
this and the following sections...."

23 Petitioner argues that this provision mandates construction
24 of all required parking spaces "at the time of erecting" the
25 building.

26 We find no error in the city's application of this

1 provision. Until it is known who will occupy the 1100
2 square-foot portion of the building and the number of employees
3 related to the proposed use, the city has no basis to determine
4 the number of spaces required by Section 7.080. Withholding an
5 occupancy permit until the number of required spaces is
6 determinable and construction of the required number of spaces is
7 completed is a reasonable interpretation of the code. We defer
8 to the city's application of its code in this way. Bienz v. City
9 of Dayton, 29 Or App 761, 566 P2d 904 (1977). The second
10 assignment of error is denied.

11 THIRD ASSIGNMENT OF ERROR

12 Petitioner alleges the decision violates a provision in the
13 city's acknowledged comprehensive plan that requires developers
14 to use storm water management plans. The comprehensive plan's
15 section on Drainage and Water Erosion includes the following
16 strategy:

17 "Require all new subdivisions and large scale
18 developments to use a storm water management plan
19 which is prepared by a qualified person and is
20 acceptable to the city. The plan will attempt to
21 follow the principle that the water falling on a given
22 site should be absorbed or retained onsite to the
23 extent that after development the quantity and rate of
24 water leaving the site would not be significantly
25 different than if the site had remained undeveloped."

26 Petitioner says no storm water management plan exists.

Petitioner also alleges the city's finding that the developer's
proposal complies with this plan strategy is a conclusion only,
without any findings about the underlying facts.

The city found that storm water collected on the site will

1 be discharged into Holbrook Slough, adjacent to the site. The
2 slough is part of drainage system leading to the Columbia
3 River. The city concluded the proposed development:

4 "will not significantly alter the quantity or pattern
5 of storm runoff from the subject property. The
6 Holbrook Slough drainage system has ample capacity to
7 handle all runoff waters from the proposed
8 development." Record 269.

9 The city also concluded that directing all storm runoff
10 water into the slough complies with the comprehensive plan
11 policy and the city's development code.

12 Respondents argue that no separate storm water drainage
13 plan is necessary in these circumstances. Respondents point to
14 evidence in the record that the high water table on the site
15 prevents water retention on the undeveloped site.

16 Consequently, storm water naturally drains off the site into
17 Holbrook Slough. According to respondents, the developer's
18 plans to discharge all drainage into the slough merely
19 continues the natural drainage pattern. Respondents also argue
20 that since the slough is the final destination of storm water
21 from the site, no intervening property is affected.

22 Respondents also point to evidence in the record that the city
23 engineer rejected as unnecessary a plan to install a water
24 storage pond near the building site as suggested by the
25 applicant's engineer. Record 218. The city engineer approved
26 the proposal to discharge all storm water directly into the
slough.

We reject petitioner's challenge. Petitioner's argument

1 fails to take account of Section 7.060(1) of the city's code.

2 This provision implements the comprehensive plan provisions

3 cited by petitioner. Section 7.060(1) states:

4 "When it is determined that there may be a problem
5 with storm water drainage due to a proposed
6 development, the applicant may be required to have a
7 registered engineer verify that the amount and pattern
of surface water drainage will not be changed in a
manner which is detrimental to other property owners
or the city's drainage system."

8 Under this section, drainage plans are not required for
9 major developments that do not change the amount or pattern of
10 surface water drainage to the detriment of other land or the
11 city drainage system. The city found the city engineer's
12 report is adequate to show this standard is met.

13 Even if we assume the policy and strategy in the Drainage
14 and Water Erosion Section of the comprehensive plan constitute
15 approval criteria in addition to Section 7.060(1), we reject
16 petitioner's attack. The plan policy and strategy require
17 assurance that after construction the quantity and rate of
18 water drainage from the site will not be significantly
19 different from that before development. The findings
20 adequately explain how quantity and rate of water discharge
21 will not be affected by the proposal.³

22 This assignment of error is denied.

23 The decision is remanded.

FOOTNOTES

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5 The base flood elevation is six feet above mean sea level.
6 Record 217. The county found the existing ground level
7 elevation is four to five feet above sea level.
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11 The record does not clearly show that fill is necessary
12 under the building. Because the soil on the site is soft, the
13 applicant's engineer recommended the building be supported on
14 piles driven down to more solid material. The engineer's
15 report makes no mention of fill as part of the the building's
16 support system. The city engineer agreed with the proposed
17 construction method, describing the developer's plan to "drive
18 pilings and construct monolithic concrete beams and a slab."
19 Record 85. The use of fill in this method of construction is
20 not described.
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22 _____
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24 Petitioner posits that a drainage plan is at least
25 necessary to disclose how storm water will be collected onsite
26 before discharge into the slough. Given that the plan policy
focuses on the quantity and rate of water leaving the site, we
reject petitioner's interpretation that the onsite details of
the drainage plan must be specified when quantity and rate of
runoff will not be affected by development.
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